Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of APPLICATION OF SBC COMMUNICATIONS, INC. FOR AUTHORIZATION UNDER SECTION 271 OF THE COMMUNICATIONS ACT TO PROVIDE IN-REGION, INTERLATA SERVICE IN THE STATE OF OKLAHOMA	CC Docket No. 97-121

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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TABLE OF CONTENTS

SUMMARY

The Telecommunications Resellers Association ("TRA"), a trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, hereby respectfully urges the Commission to deny the application filed by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance pursuant to Section 271(d) of the Communications Act for authority to "originate" interLATA services within the State of Oklahoma. Southwestern Bell has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company provision of "in-region," interLATA service, but has not demonstrated that grant of the authorization it seeks here would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3). Indeed, Southwestern Bell's Application is plagued by a host of fundamental flaws, any number of which alone render impossible grant of the requested "in-region," interLATA authority. In order to avoid a rush of other no less premature applications for "in-region," interLATA authority, TRA further urges the Commission, if it does not summarily dismiss the Southwestern Bell Application, to provide in denying it detailed guidance as to the nature and extent of the showings that will be necessary to satisfy Sections 271(c) and 271(d)(3).

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Public Notice, DA 97-753 (released April 11, 1997), hereby opposes the application ("Application") filed by SBC Communications, Inc. ("SBC"), Southwestern Bell Telephone Company ("SWBTC"), and Southwestern Bell Long Distance ("SWBLD") (collectively, "Southwestern Bell") under Section 271(d) of the Communications Act of 1934 ("Communications Act"),[1] as amended by Section 151 of the Telecommunications Act of 1996 ("1996 Act"),[2] for authority to "originate" interLATA services within the Southwestern Bell "in-region State" of Oklahoma ("Application").[3] As TRA will demonstrate below, Southwestern Bell

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[1] 47 U.S.C. § 271(d).

[2] Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

[3] An "in-region State" is "a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 271(i)(1).

has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company ("BOC") provision of "in-region," interLATA service,[4] but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3).[5] Given that the Commission cannot, therefore, make the affirmative findings required by Section 271(d), TRA submits that the Southwestern Bell Application cannot be granted. TRA, accordingly, urges the Commission to deny Southwestern Bell the "in-region," interLATA authority it seeks here. Moreover, in order to avoid a rush of no less premature applications for "in-region," interLATA authority, TRA respectfully urges the Commission in so ruling to provide Southwestern Bell and the other BOCs, as well as other interested parties, with detailed guidance as to the nature and extent of the showings that will be necessary to satisfy Sections 271(c) and 271(d)(3).

I.

INTRODUCTION

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international,

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[4] 47 U.S.C. § 271(c).

[5] 47 U.S.C. § 271(d)(3).

wireless, enhanced and internet services.[6] TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks." TRA's resale carrier members, accordingly, will not only be direct competitors of Southwestern Bell in both the local exchange, long distance and other markets, but will be reliant upon Southwestern Bell as an incumbent LEC for wholesale services and access to unbundled network elements, as well as for exchange access services.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies[7] -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars.[8]

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[6] TRA's resale carrier members serve generally small to mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates generally available only to much larger users. TRA's resale carrier members also offer small to mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users. And TRA's resale carrier members are at the forefront of industry efforts to diversify and expand service and product offerings, endeavoring in so doing to satisfy in a convenient and cost-effective manner all of the telecommunications needs of both residential and commercial consumers.

[7] The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of $10 million and employs in the neighborhood of 50 people. Among TRA's resale carrier members, roughly 30 percent have been in business for less than three years and over 80 percent were founded within the last decade. And while the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 25 percent of TRA's resale carrier members generate revenues of $5 million or less a year and less than 20 percent have reached the $50 million threshold. Seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have work forces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers.

[8] TRA's resale carriers are also well represented among the ten, and constitute more than half of the twenty, largest interexchange carriers in the Nation.

The emergence and dramatic growth of the resale industry over the past five to ten years has produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers ("IXCs") by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.[9]

TRA's interest in this matter is in protecting, preserving and promoting competition within the interexchange market, as well as in speeding the emergence and growth of resale, non-facilities-based, and ultimately facilities-based competition in local exchange/exchange access markets within the State of Oklahoma and elsewhere. Permitting premature entry by any of the BOCs, including Southwestern Bell, into the "in-region," interLATA market would jeopardize the vibrant and dynamic competition that now characterizes the interexchange market, and retard the emergence and development of competitive local exchange/exchange access markets. As the Commission has recognized, there are a host of ways in which control of local exchange/exchange "bottlenecks" can be leveraged by the BOCs and other incumbent LECs to disadvantage IXC rivals, particularly if interstate switched access charges remain at their current

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[9] President Clinton could have been referring to TRA's resale carrier members when he noted in The State of Small Business: A Report of the President 1994 (at page 7), "a great deal of our Nation's economic activity comes from the record number of entrepreneurs living the American Dream. . . . I firmly believe that we need to keep looking to our citizens and small businesses for innovative solutions. They have shown they have the ingenuity and creative power to make our economy grow; we just need to let them do it."

inflated levels.[10] The Commission has further recognized that the BOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local telecommunications market.[11]

As the Commission has acknowledged, monopolists do not readily relinquish market power; theoretically "contestable" markets cannot be miraculously transformed into actually "contested" markets overnight.[12] Unless there exists a potent countervailing incentive or disincentive to do otherwise, it can be anticipated that the BOCS, including Southwestern Bell, and other incumbent LECs will actively seek to forestall local exchange/exchange access competition as a profit maximizing strategy. And given past practices, it can also be anticipated that the BOCS, including southwestern Bell, and other incumbent LECs will utilize their "bottleneck" control of exchange access facilities to disadvantage interexchange competitors.[13]

TRA submits that the market conduct of BOCs and other incumbent LECs will be adequately disciplined only when viable facilities-based competition has emerged in the local exchange/exchange access market and that the only incentive that may be strong enough to

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[10] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489, ¶¶ 10 - 12 (released Dec. 24, 1996).

[11] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶¶ 10 - 23 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order").

[12] *See, e.g.,* id.

[13] *See, e.g.,* United States v. Western Electric Co., 767 F.Supp. 308, 322 (D.D.C. 1991) ("Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct, albeit necessarily on a limited scale.").

motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services. As succinctly stated by the Commission:

> We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act,* to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services.[14]

Hence, the public interest would not be served by sanctioning entry by Southwestern Bell into the Oklahoma "in-region," interLATA market until the bulk of the residents of the State of Oklahoma can select among multiple facilities-based providers of local exchange/exchange access service. In other words, Southwestern Bell should not be awarded the authority it seeks here until it is facing established facilities-based competition in at least all of the major population centers within the State of Oklahoma. Certainly, Southwestern Bell should not be granted such authority until it has fully satisfied the "competitive checklist;" the relaxed "competitive checklist" compliance standards advocated by Southwestern Bell should be summarily rejected.

The Commission has an opportunity to realize the Congressional vision reflected in the 1996 Act of a fully integrated, highly competitive telecommunications marketplace. That opportunity should not be lost by giving away the "carrot" relied upon by Congress to prompt "the opening [of] all telecommunications markets to competition."[15]

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[14] Local Competition First Report and Order, FCC 96-325 at ¶ 55. As the Chief Executive Officer of one BOC candidly noted:

> The big difference between us and [the GTE] is they're already in long distance. What's their incentive to cooperate.

"Holding the Line on Local Phone Rivalry," The Washington Post, pp. C-12, C-14 (Oct. 23, 1996).

[15] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement").

II.

ARGUMENT

A. Procedures for Reviewing a BOC Application for "In-Region," InterLATA Authority Under Section 271

Within ninety days following submission by a BOC of an application to provide interLATA services originating (or in the case of inbound and private line services, terminating) within a State in which the BOC provides local exchange/exchange access service as an incumbent LEC, the Commission must issue a written determination approving or denying the application.[16] In undertaking that review, the Commission must consult with, and give "substantial weigh to the recommendations of the U.S. Attorney General;"[17] the Commission must also consult with the telecommunications regulatory authority of the State that is the subject of the BOC application to verify the compliance of the applying BOC with the requirements for providing certain "in-region," interLATA services set forth in Section 271(c).[18]

The Commission may not grant a BOC application for "in-region," interLATA authority unless it makes an affirmative determination that the applying BOC has met the requirements of Section 271(c)(1) and (2) for the State for which authorization is sought, including: (i) a showing that either the BOC is providing, pursuant to a binding agreement approved under Section 252, access and interconnection to its facilities for the network facilities of an unaffiliated competitor that is providing telephone exchange services to residential and business subscribers exclusively or predominantly over its own landline telephone exchange

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[16] 47 U.S.C. § 271(d)(3).

[17] 47 U.S.C. § 271(d)(2)(A).

[18] Id.

service facilities ("Track A"), or, if no unaffiliated facilities-based competitor has requested such network access and interconnection, the BOC is offering to provide such access and interconnection pursuant to a statement of generally available terms and conditions ("SGATC") approved or permitted to take effect by the pertinent State regulatory authority ("Track B"), and (ii) a demonstration that the BOC has fully implemented in at least one access and interconnection agreement with a facilities-based competitor or offered in a statement of generally available terms all fourteen items included on the "competitive checklist."[19] For the Commission to determine that a BOC has fully satisfied the 14-point "competitive checklist," the BOC must have provided competitive LECs with (i) physical interconnection of network facilities at cost-based rates, (ii) nondiscriminatory access at cost-based rates to unbundled network elements, including local loop, local transport, local switching, and database and associated switching, as well as to poles, ducts, conduits and other rights of way, 911 and E911 service, directory assistance, operator call completion services and white pages directory listings, (iii) viable interim number portability, (iv) local dialing parity, (v) reciprocal compensation arrangements, and (vi) opportunities to resell all retail service offerings at wholesale rates reflective of reasonably avoidable costs.[20]

Before granting a BOC application for "in-region" authority, the Commission must further make an affirmative determination that any authorization it grants to the applying BOC will be carried out in accordance with the structural and transactional requirements, nondiscrimination safeguards, audit obligations and marketing restrictions set forth in Section

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[19] 47 U.S.C. § 271(d)(3)(A).

[20] 47 U.S.C. § 271(c)(2)(B).

272.[21] And critically, the Commission must find that grant of the requested "in-region," interLATA authority is consistent with the public interest, convenience and necessity.[22]

B. Standards for Reviewing a BOC Application for "In-Region," InterLATA Authority Under Section 271

1. "Track A" or "Track B"

Section 271(c)(1) provides two mutually exclusive means by which its requirements may be met -- the so-called "Track A" and "Track B" compliance vehicles. A BOC seeking "in-region," interLATA authority thus may proceed under either "Track A" or "Track B", but not both. Moreover, a BOC may not proceed under "Track B," once "Track A" has been triggered by a new market entrant's request to interconnect its network facilities with the network facilities of the BOC.

With respect to the first premise, Section 271(c) makes express use of the disjunctive "or" in setting forth the alternative showings upon which a BOC may rely in satisfying the requirements of subsection "(1)."[23] To comply with Section 271(c)(1), a BOC must "meet[] the requirements of subparagraph A *or* subparagraph B."[24] The disjunctive "or" was also used by the Congress in Section 271(c)(2)(A) and again in Section 271(d)(3)(A) in referring to the "Track A" and "Track B" compliance vehicles.[25] Likewise, the Conference Committee

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[21] 47 U.S.C. § 271(d)(3)(C); 47 U.S.C. § 272.

[22] 47 U.S.C. § 271(d)(3)(C).

[23] In interpreting statutes, courts generally contrue statutory requirements written in the disjunctive as setting out separate and distinct alternatives. *See, e.g.,* United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990).

[24] 47 U.S.C. § 271(c)(1) (emphasis added).

[25] 47 U.S.C. §§ 271(c)(2)(A), 271(d)(3)(A).

made clear that a BOC must rely on either "Track A" or "Track B," not both, in satisfying the requirements of Section 271(c)(1):

> a BOC must satisfy the "in-region" test by virtue of the presence of a facilities-based competitor or competitors under new section 271(c)(1)(A), *or* by the failure of a facilities-based competitor to request access or interconnection (under new section 251) as required under new section 271(c)(1)(B).[26]

Indeed, nowhere in the 1996 Act or in the legislative history of the 1996 Act is there any suggestion that a BOC may utilize a combination of negotiated/arbitrated access/interconnection agreements and a SGATC to satisfy the requirements of Section 271.

Confirming this view are the dramatically different threshold standards applied under "Track A" and "Track B." Under "Track A," a BOC must demonstrate that it "*is providing* access and interconnection to its network facilities for the network facilities of one or more competing providers of telephone exchange service."[27] Under "Track B," a BOC must only "*generally offer[]* to provide such access and interconnection."[28] Offering to provide a service is a far cry from actually providing the service. In other words, a "Track B" showing would not satisfy the "Track A" standard.

That a BOC may not proceed under "Track B," once "Track A" has been triggered is apparent from the express terms of Section 271(c)(1)(B). Section 271(c) dictates that a BOC may proceed under "Track B" only if no new market entrant has sought to interconnect its network facilities to the network facilities of the BOC within ten months following enactment

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[26] Joint Explanatory Statement at 147 (emphasis added).

[27] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[28] 47 U.S.C. § 271(c)(1)(B) (emphasis added).

of the 1996 Act. The only exceptions recognized by Section 271(c) are instances in which such a request has been made but the requesting entity thereafter has failed to negotiate in good faith or has failed to comply with the implementation schedule incorporated into the Section 252 network access/interconnection agreement it entered into with the BOC. In other words, the Congress sought to ensure that the BOCs would not be denied "in-region," interLATA authority through strategic manipulation of local market entry procedures, providing the BOCs with a viable market entry vehicle in the event that the largest IXCs elected to forego the opportunity to provide local service in order to keep the BOCs out of the long distance market or sought to delay such BOC market entry through bad faith negotiating or operational stratagems. As described in the Conference Report, "[n]ew section 271(c)(1)(B) . . . is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market."[29]

Treating Section 271(c) as anything other than as a narrowly-crafted exception incorporated into the 1996 Act to protect BOCs from strategic manipulation of local market entry procedures would essentially deny subsection "(A)" a role in the Commission's evaluation of BOC Section 271 applications. Any more expansive reading of Section 271(c) would free BOCs to apply for authorization to provide "in-region," interLATA service a short ten months following the enactment of the 1996 Act even if they had not negotiated network access/interconnection arrangements in good faith or had engaged in other dilatory tactics. As the Commission has recognized, such anticompetitive conduct should be anticipated, particularly if good faith

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[29] Joint Explanatory Statement at 148.

negotiations are not required to satisfy requirements for grant of "in-region," interLATA authority:

> We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act,* to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market.[30]

Moreover, reading Section 272(c) to allow a BOC to proceed under "Track B" even if a network access/interconnection request had been received from a potential facilities-based competitor would create a thematic conflict with other telephony provisions of the 1996 Act. The Congressional preference that network access/interconnection should generally be achieved through negotiation is made clear by the dual statutory requirements (i) that incumbent LECs "negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in [both subsections '(b)' and '(c)' of Section 251]," and (ii) that the incumbent LEC and the telecommunications carrier requesting network access/interconnection must engage in voluntary negotiations for at least 135 days prior to petitioning a State commission for arbitration of any remaining disputes.[31] Arbitrations and SGATCs come into play only when negotiations have not been initiated or, once commenced, have broken down.

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[30] Local Competition First Report and Order, FCC 96-325 at ¶ 55 (emphasis added).

[31] 47 U.S.C. § 252(a)(1), (b)(1).

In addition, the Congress clearly recognized that the local exchange/exchange access market will only become truly competitive once alternative physical networks have been deployed. Thus, "Track A" anticipates agreements authorizing "access and interconnection to [the BOC's] network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service" providing service "either exclusively . . . or predominantly over their own telephone exchange service facilities."[32] As the Conference Report confirms, the non-facilities-based resale offering of local exchange service by itself will not constitute competition sufficient to justify the grant of "in-region," interLATA authority to a BOC.[33] Accordingly, while "Track B" protects BOCs from strategic manipulation of the local entry process, "Track A" is designed to increase the likelihood that viable competition will emerge in the local exchange/exchange access market. Certainly, it would make no sense for the Congress to expressly require the presence of a "facilities-based competitor" under "Track A," but allow the BOCs to avoid this requirement altogether simply by waiting a mere ten months to file their Section 271 applications.

Once a request for network access/interconnection has been received by a BOC, the sole remaining issue in determining whether a BOC may proceed under "Track B" is whether the request has been made by an "unaffiliated competing provider of telephone exchange service" which is seeking "access and interconnection to [the BOC's] network facilities for . . . [its] network facilities."[34] It is indisputable that in order to preclude use of "Track B," the requesting

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[32] 47 U.S.C. § 271(c)(1).

[33] Joint Explanatory Statement at 148.

[34] 47 U.S.C. § 271(c)(1)(A).

carrier must be unaffiliated with the serving BOC and must intend to use some of its own facilities in the provision of a competitive local exchange service. The requesting carrier need not, however, intend to provide service "either exclusively . . . or predominantly over . . . [its] own telephone exchange service facilities." This additional specification was expressly included in Section 271(c)(1) solely "for the purpose of . . . subparagraph ['(A)']."[35] It, therefore, defines the "Track A" compliance threshold without expanding the limited role of "Track B."

Certainly, in order to preclude BOC use of "Track B," the requesting carrier need not be actually providing local exchange service either when it requests network access/interconnection, when the BOC's SGATC is filed or becomes effective, or when the BOC files its Section 271 application. Section 271(c)(1)(B)'s reference to "a provider" does not require the then-current provision of local exchange service; rather it describes a potential facilities-based competitor seeking entrance into the local exchange market through network access/ interconnection. This view is confirmed by the second exception recognized by Section 271 (c)(1)(B) -- *i.e.,* "failure to comply, within a reasonable period of time, with the implementation schedule contained in . . . [a network access/interconnection] agreement."[36] Given that it is impossible to provide a viable facilities-based local exchange service in a market without interconnecting with the serving BOC's network, the Congress' identification of a new market entrant's failure to meet an interconnection implementation schedule as an effective negation of a network access/interconnection request can only be read to mean that the new market entrant need only be planning to provide a facilities-based competitive local exchange service when it

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[35] Id.

[36] 47 U.S.C. § 271(c)(1)(B).

requests interconnection in order to preclude further BOC reliance upon "Track B." The BOC is protected from any gamesmanship in which new market entrants might attempt to engage by the treatment of a requesting party's failure to negotiate or to comply with an agreed upon implementation schedule as an effective negation of its network access/interconnection request.

It would indeed be nonsensical to require that a requesting carrier be actually providing a competitive local exchange service utilizing its own facilities at the time it requested network access/interconnection or when the BOC filed its SGATC or Section 271 application, in order to preclude BOC use of "Track B." As the Commission is aware, virtually no local exchange competition existed prior to passage of the 1996 Act[37] and the BOC would be in a position to assure that no such competition took root prior to the filing (or approval) of its SGATC or its Section 271 application under "Track B." Thus, if Section 271(c) were read to require that a requesting carrier be actually providing a competitive local exchange service utilizing its own facilities at the time it requested network access/interconnection, a BOC, simply by blocking market entry by any facilities-based competitor through delay and/or bad faith negotiating tactics, could secure entry into the "in-region," interLATA market through the "Track B backdoor" without having to open its local exchange/exchange access markets to facilities-based competition.

In short, a BOC may not proceed under "Track B" once a request has been received by an entity seeking the right to interconnect its network facilities to the network facilities of the BOC for purposes of providing a competitive local exchange service offering. The submission of a *bona fide* network access/interconnection request itself is the determinative

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[37] *See, e.g.,* Common Carrier Bureau, "Common Carrier Competition" (Spring, 1996).

act and the import of this action is not impacted by the timing or the manner of the new market entrant's initiation of service, absent bad faith negotiations or contractual breach. The requesting entity need not be a full or even a predominately facilities-based provider; it must only propose to utilize some of its own network facilities. Moreover, the requesting entity need not be providing a competitive local exchange service offering when the network access/interconnection request is made or at any given time thereafter; it must only negotiate in good faith and comply with agreed upon service implementation schedules.

2. Presence of a Facilities-Based Competitor

"Track A" of Section 271(c)(1) and (2) may be satisfied only if the applying BOC has entered into, and (i) is providing network access and interconnection under, a network access/interconnection agreement that is (ii) binding and approved by the pertinent State regulatory authority and is with an entity providing service (iii) to residential and business subscribers, and doing so (iv) exclusively over its own telephone exchange service facilities, or at least (v) predominantly over such facilities. Among the issues that must be resolved in addressing the Southwestern Bell Application and all other subsequent BOC applications for "in-region," interLATA authority are (i) the breadth and depth of the universe of residential and business subscribers the competitive LEC must be serving; (ii) what qualifies as a competitor's "own facilities;" (iii) how should "predominantly" be defined; (iv) what constitutes a "binding" and "approved" agreement, and (v) what constitutes the provision of network access and interconnection.

a. Serving Residential and Business Subscribers

Section 271(c)(1) does not specify the quantity, the mix or the geographic range of residential and business subscribers a facilities-based competitor must serve in order to be found to be providing "telephone exchange service . . . to residential and business subscribers." Certainly, an entity serving a small handful of residential and business subscribers in a single office building and/or apartment complex in a single city would not be adequate. Such a restricted reading would render the requirement effectively a nullity and Congress is generally not presumed to engage in meaningless or ineffective acts.[38]

Left unstated, however, is what critical mass of residential and business subscribers facilities-based competitors must be serving for a BOC to be deemed to be facing facilities-based competition. TRA submits that this requirement, like all other preconditions to BOC entry into the "in-region," interLATA market, should be read in light of the key Congressional goals embodied in the telephony provisions of the 1996 Act -- *i.e.,* "(1) opening the local exchange and exchange access market to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition."[39]

The twin goals of fostering local exchange/exchange access, and preserving existing interexchange, competition will not be realized unless consumers generally may choose

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[38] *See, e.g.,* National Insulation Trans. Com. v. ICC, 683 F.2d 533, 537 (D.C.Cir. 1982); United States v. Blasius, 397 F.2d 203 (2d Cir. 1968), *cert. denied* 393 U.S. 1008 (1969).

[39] Local Competition First Report and Order, FCC 96-325 at ¶ 3.

from among multiple local service providers. As succinctly stated by Representative Jim Bunning (R-KY):

> We should not allow the regional Bells into the long distance market until there is real competition in the local business and residential markets.[40]

"Real competition" requires widespread availability of service and a demonstrated ability to provide a viable competitive alternative. Certainly, it would trivialize the requirement that service be provided to residential and business subscribers if the universe served of either category of consumers was tiny and geographically concentrated.

It goes without saying that the provision of service to both residential and business customers must be on a commercial basis. Thus, in referring to the telephone exchange service offered to residential and business subscribers, Section 271(c)(1)(A) makes express reference to "one or more unaffiliated *competing* providers."[41] The conduct of a test does not constitute competition. Competition begins when commercial operation is initiated.

b. A Competitor's Own Telephone Exchange Service Facilities

Section 271(c)(1)'s requirement that an access and interconnection agreement be with a competitor providing telephone exchange service over its own facilities, in TRA's view, is clear on its face. The qualifier "own" requires "ownership" which is commonly defined as the "legal right of possession, lawful title (to something); proprietorship."[42] Hence, the facilities over which a competitive local exchange service is provided must be facilities as to which the

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[40] 141 Cong. Rec. H8458 (Aug. 4, 1995).

[41] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[42] *See, e.g.,* Websters New World Dictionary of the American Language, College Edition., p. 1046 (1968).

competitive LEC has title, or at a minimum, absolute control apart from the BOC with whom it is competing. Confirming this assessment are the distinctions drawn by Section 271(c)(1)(A) both between "the network facilities of one or more unaffiliated competing providers" and "[the Bell operating companies] network facilities" to which they are interconnected and between services provided over the competitor's "own telephone exchange service facilities" and the "resale of the telecommunications services of another carrier."[43] The reference to "another carrier" is obviously not to the BOC with whom the competitive LEC is competing since Section 271(c)(1) also makes reference to "[a] Bell operating company."[44] Hence, even the resale of telephone exchange services which may complement the services provided over a competitive LEC's own facilities may not involve the BOC with which the competitor is competing. Clearly, a competitor is not using its "own" facilities if it is using unbundled network elements obtained from the BOC with which it is competing. Indeed, the Conference Committee drew a sharp distinction between a competitor's network and the "facilities and capabilities (*e.g.*, central office switching) . . . obtained from the incumbent local exchange carrier as network elements pursuant to new section 251."[45]

The above understanding of the requirement that a competitor be providing a competitive telephone exchange service over its "own" facilities is consistent with the clear view of Congress that the presence of a facilities-based competitor is an essential component of a competitive local exchange/exchange access market. It belabors the obvious to suggest that to

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[43] 47 U.S.C. § 271(c)(1)(A).

[44] Id.

[45] Joint Explanatory Statement at 148.

the extent a competitive LEC is reliant for facilities upon the BOC with which it is competing, it remains vulnerable to anticompetitive abuses engaged in by that BOC. In such a circumstance a competitor is dependent upon the BOC for, among other things, provisioning, maintenance and repair, not to mention obligated to pay charges assessed by the BOC. As the Commission has recognized:

> [I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged.[46]

Moreover, the Commission has repeatedly drawn distinctions between a competitor's use of an incumbent LEC's unbundled network elements and a competitor's own facilities, recognizing that the former involves greater reliance upon the incumbent LEC.[47]

c. Predominantly Over a Competitor's Own Telephone Exchange Service Facilities

As a matter of basic statutory construction, words used in statutes should be interpreted in their ordinary, everyday senses.[48] The term "predominant" means superior, dominating, and predominant. In other words, "predominant" means at least "greater in amount" and generally more than a mere majority.[49] Hence, "predominantly over [a competitor's] own telephone exchange services facilities" means that at a minimum more than half of the facilities

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[46] Local Competition First Report and Order, FCC 96-325 at ¶ 518.

[47] *See, e.g.,* id. at ¶¶ 12, 232, 328, 330, 334, 336, 362.

[48] *See, e.g.,* Perrin v. United States, 444 U.S. 37, 42 (1979); Burns v. Alcala, 420 U.S. 575, 579 (1975).

[49] *See, e.g.,* Websters New World Dictionary of the American Language, College Edition., p. 11151 - 52 (1968).

comprising a competitive CLEC's network must be obtained from someone other than the incumbent LEC with which the competitor is competing. And in order to achieve this threshold, among the facilities the competitive CLEC must be providing are subscriber lines.

While it recognized that "it is unlikely that competitors will have *a fully redundant network* in place when they initially offer local service," and that "*some facilities and capabilities* (*e.g.,* central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements,"[50] Congress certainly contemplated that the vast bulk of the facilities would be owned by the competitive LEC. Indeed, Congress made clear that a facilities-based competitor would have to provide the loop facilities used to serve its customers:

> The House has specifically considered how to describe the facilities-based competitor in new subsection 271(c)(1)(A). While the definition of facilities-based competition has evolved through the legislative process in the House, the Commerce Committee Report (House Report 104-204 Part I) that accompanied H.R. 1555 pointed out that meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated. For example, large, well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets. Similarly, Cablevision has recently entered into an interconnection agreement with New York Telephone with the goal of offering telephony on Long Island to its 650,000 cable subscribers.[51]

A competitor without its own loop facilities is not a facilities-based competitor; such a competitive LEC operates a "virtual" not a "physical" network. Subscriber lines are the

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[50] Joint Explanatory Statement at 148.

[51] Id. at 147 - 48 ("This [Section 271(c)] test that the conference agreement adopts comes virtually verbatim from the House amendment.").

ultimate "bottleneck." If a competitor must take loop facilities from an incumbent LEC, it remains entirely dependent on the incumbent LEC for access to existing and potential customers. As such, the competitive LEC remains vulnerable to anticompetitive abuses by the incumbent LEC and thus presents a far less formidable competitive force.

d. Binding and Approved Agreement

Section 271(c)(1)(A)'s requirement that the network access/interconnection agreement or agreements that the applying BOC must have entered into with one or more facilities-based competitors must be "binding" and "approved under section 252" is the most straightforward of the Section 271(c)(1)(A)'s mandates and thus requires little comment here. An agreement is "binding" if it is executed by all parties and commits such parties to perform as provided therein. An agreement is "approved" if the pertinent State regulatory authority has approved it or failed to reject it within specified statutory deadlines. Generally then, the Commission must look to the pertinent State regulatory authority to determine if an interconnection agreement has been approved.

To satisfy Section 271(c)(1)(A), however, the network access/interconnection agreement or agreements relied upon by the applying BOC must also be complete. Accordingly, if the provision of network access/interconnection to the facilities-based competitor is subject to additional unstated terms and conditions, the agreement should not be deemed sufficient to justify grant of "in-region," interLATA authority. An agreement that does not contain all charges that will be assessed for network access/interconnection "would not specify[] the terms and conditions under which the Bell operating company is providing access and interconnection," as required